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No. 81-330

IN THE

Supreme Court of the United States

October Term, 1981

UNITED ENGINEERS & CONSTRUCTORS INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did not the courts below err in ruling that, regardless of whether the contractors knew or had reason to know of the Union's discrimination, they were vicariously liable for the Union's discriminatory referrals from the hiring hall?

2. Did not the courts below adopt an erroneous construction of 42 U. S. C. § 1981, under which the contractors were held liable for race discrimination despite the district court's finding that the plaintiffs had failed to prove intent by the contractors to discriminate?

3. Did not the courts below err in certifying a defendant class and in holding approximately 1400 contractors in the defendant class liable injunctively to the plaintiffs for race discrimination, without considering either the contractors' individual minority utilization statistics or their individual defenses?

4. Did not the courts below err in asserting personal jurisdiction over the defendant class members, who had neither been named as parties in the complaint nor served with process?

5. Did not the courts below err in permitting the action to proceed as a defendant class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, thereby denying the defendant class members the right to opt out of the class?

PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were (1) the Commonwealth of Pennsylvania (a plaintiff below and respondent in this Court); (2) twelve individuals—Raymond Williams, Willie McKay, Marion J. Eaddy, Randolph Hughes, Jr., Arel Brownlee, William Bostic, Kenneth Howard, Alpha Christmas, Ronald Richardson, Clarence Winder, Ronald Crawford and Frank Gilchrist (the individually named plaintiffs below and respondents in this Court); (3) Local Union 542, International Union of Operating Engineers (a named defendant below); (4) Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware (a named defendant below); (5) four contractor associations, all of which were named defendants below—General Building Contractors Association, Inc. (petitioner in Case No. 81-280), Contractors Association of Eastern Pennsylvania and United Contractors Association (joint petitioners in Case No. 81-331), and Pennsylvania Excavating Contractors Association (which is now defunct and has not filed a petition with this Court); (6) Glasgow, Inc. (a named defendant below and a petitioner in Case No. 81-332); (7) Bechtel Power Corporation (a nonparty member of the defendant class and petitioner in Case No. 81-333); and (8) United Engineers & Constructors Inc. (a nonparty member of the defendant class and petitioner herein).

In addition, the proceedings below involved a plaintiff class estimated to have more than 1,000 members and a defendant class estimated to have approximately 1,400 members. Petitioner herein knows the identities of only a small fraction of the individual members of the plaintiff and defendant classes.

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UNITED ENGINEERS & CONSTRUCTORS INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Petitioner, United Engineers & Constructors Inc. (United),[1] hereby submits its brief on the merits.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (PA. 9-212)[2] has

1. Pursuant to Supreme Court Rule 28.1, United Engineers & Constructors Inc. states that it is a wholly-owned subsidiary of Raytheon Company, a publicly-owned corporation.

2. References cited as "PA.," followed by the page number, are references to the appendix to the Petitions for Certiorari filed by United and by the Petitioners in Nos. 81-331, 81-332 and 81-333. Under Supreme Court Rule 30.1, the portions of the record contained in the appendix to the Petitions for Certiorari have not been reproduced in the Joint Appendix. References herein to the Joint Appendix are "JA.," followed by the page number.

been officially reported at 469 F. Supp. 329. The per curiam opinion of the United States Court of Appeals for the Third Circuit (PA. 8), which affirmed the judgment of the District Court with respect to the contractors' appeals by an evenly divided court, has been officially reported at 648 F. 2d 923.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1981 (PA. 3). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The following statute and rules are involved in the consideration of the instant petition. The pertinent text of each is set forth in the Addendum appearing at the end of this brief:

Civil Rights Act of 1866:
42 U. S. C. § 1981

Federal Rules of Civil Procedure:
Rule 23(a)
Rule 23(b)
Rule 23(c)(2)

STATEMENT OF THE CASE

This Court has granted a writ of certiorari to review a per curiam *en banc* decision by an evenly divided United States Court of Appeals for the Third Circuit (PA. 8). The Court of Appeals affirmed a District Court decision (PA. 9-212) that had held 1,400 contractors in a defendant class "vicariously liable" under 42 U. S. C. § 1981 for the racially discriminatory referral practices of a union

hiring hall. After an eighteen month trial, the District Court found that Local 542 of the International Union of Operating Engineers ("the Union" or "Local 542") had engaged in a pattern and practice of racial discrimination against minorities seeking entry into the Union and, with respect to those minorities already admitted, seeking referrals through the union hiring hall.

The District Court's imposition of liability on the contractors was unprecedented in several respects. The District Court did not find that any of the contractors in the defendant class had themselves discriminated against minorities. Indeed, it found that the plaintiffs had failed to prove that the contractors intended to discriminate or even that they had knowledge or reason to know of the Union's discrimination (PA. 195). Nevertheless, the District Court found the contractors "vicariously" liable for the Union's discrimination, on the grounds that the Union was the contractors' "agent" (PA. 191) and that the employers had "an 'affirmative duty' to prevent discrimination" (PA. 186). The District Court expressly held the contractors "injunctively liable" for the Union's discrimination regardless of whether they knew or should have known of that discrimination (PA. 168).

The District Court's decision was unprecedented in several other respects in addition to its ruling on vicarious liability. First, none of the 1,400 defendant class members who was held liable and was burdened by the injunction had been named as a defendant in the complaint or served with process, and none had participated in the trial. Second, liability was imposed on the contractors despite the absence of any proof of the contractors' individual minority utilization statistics. Indeed, the District Court expressly determined that the employers could be held liable regardless of their individual employment

statistics (PA. 195). It also denied a motion for summary judgment filed by one contractor (Barger, Inc.) (JA. 134), and subjected that contractor to the same injunctive order imposed on all other contractors, despite the uncontradicted evidence that at least 50% of Barger's operating engineers were black (JA. 126-129).

After entering its findings of liability, the District Court issued a broad and costly injunction which, as amended (JA. 386), requires all 1,400 contractors in the defendant class to meet ambitious minority utilization goals regardless of the availability of skilled minority operating engineers (JA. 391, 396-99), to provide on-the-job training to minorities (JA. 405-06) even though the contractors were not found to have provided any training to whites, and to submit to a reporting commit[illegible] regular monthly reports listing minority hours and wages (JA. 406).[3]

United and the four other petitioners appealed from the entry of the District Court's injunctive order under 28 U. S. C. § 1292(a)(1). After the injunctive order was affirmed by an evenly divided Court of Appeals, United and the other petitioners filed timely p[illegible]titions for a writ of certiorari. On October 19, 1981, the five petitions were granted and the cases were consolidated Nos. 81-280, 81-330, 81-331, 81-332 and 81-333.

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3. Pursuant to a pretrial order bifurcating the trial into separate liability and damage phases (JA. 132-133), liability for damages is to be determined at a later date. However, the District Court did state that its finding of vicarious liability "is not designed to carry with it . . . a presumption of back pay liability specifically against the employers themselves" (PA. 196) and, on April 6, 1981, the District Court decertified the defendant class for the damages phase.

SUMMARY OF ARGUMENT

The courts below erred in concluding that the contractors were vicariously liable under 42 U. S. C. § 1981 whether or not they had a discriminatory intent and whether or not they knew or had reason to know of the Union's discrimination. *Respondeat superior* makes no sense in the context of labor relations, since an agency relationship between the Union and the contractors cannot exist. Unlike a true agency relationship, the contractors in the case at bar did not have a right to control the Union and were not free to revoke the Union's authority at any time. Moreover, the only duty imposed on the contractors by 42 U. S. C. § 1981 is the duty not to practice intentional discrimination. The District Court therefore erred in ruling that the contractors had an "affirmative duty" to prevent the Union's discrimination.

Second, the courts below erred in finding United and the other defendant class members liable and in imposing mandatory injunctive relief on them without considering their individual minority utilization statistics. Under this Court's decision in **International Brotherhood of Teamsters v. United States,** 431 U.S. 324, 361 (1977), an employer may not be ordered to provide class-wide injunctive relief unless the trial court finds that the employer so enjoined had engaged in a pattern or practice of discrimination. The District Court made no finding that there had been a pattern and practice of discrimination in the selection of United's work force, and indeed could not have made such a finding because United's minority utilization statistics were never received in evidence. There is thus a complete failure of proof as to United.

Third, the courts below erred in permitting the action to proceed as a defendant class action. Because the District Court erroneously concluded that the contractors

could be held liable for the Union's discrimination irrespective of the contractors' own hiring statistics, conduct and intent, it refused to consider numerous individual liability issues and defenses which rendered certification of a defendant class improper.

Fourth, the District Court erred in concluding that it had personal jurisdiction over the members of the defendant class. As a member of the defendant class, United was neither named in the Complaint nor served with process. Consequently, the District Court lacked jurisdiction over it and could not obtain such jurisdiction merely by certifying the action as a defendant class action. A defendant class action may be proper for determining certain common legal issues in a manner that might have *res judicata* consequences for the class members, but it is never a proper basis for adjudicating the liability of nonparties to the action or for obtaining personal jurisdiction over them.

Finally, the District Court erred in permitting the action to proceed as a defendant class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Defendant class actions do not fit within the language of subdivision (b)(2). If a defendant class could have been certified at all, it should have been certified under subdivision (b)(3) so that the defendant class members would have had the right to opt out of the class.

ARGUMENT

I. The Courts Below Improperly Imposed Vicarious Liability on the Contractors for the Union's Discriminatory Referral Practices.

While there is little precedent directly applicable to the question of an employer's vicarious liability for a union's discriminatory referral practices, the authority that does exist is clearly contrary to the decisions below. In the employment discrimination context, most courts have flatly held that employers or employer associations are not vicariously liable for a union's discrimination: **Vogler v. McCarty, Inc.**, 294 F. Supp. 368, 374-75 (E. D. La. 1968), *aff'd on other grounds sub nom.* **Heat & Frost Insulators & Asbestos Workers v. Vogler,** 407 F. 2d 1047 (5th Cir. 1969); **Allen v. Pipefitters Local Union No. 208,** 56 F. R. D. 473 (D. Colo. 1972); **McFadden v. Baltimore Steamship Trade Association,** 8 BNA FEP Cases 391, 393 (D. Md. 1972).[4] At the very least, this Court should rule, as all

4. *See also* **Byrd v. Local Union No. 24,** 375 F. Supp. 545 (D. Md. 1974), which cited **McFadden** with approval but distinguished it on the ground that in **Byrd,** unlike **McFadden,** the complaint alleged that the defendants had participated in the union's discriminatory referral practices "by knowingly accepting discriminatory referrals and by requesting the referral of white union members" and that the union had discriminated "with the knowledge, approval, and active participation of the subcontractors." 375 F. Supp. at 556.

As the District Court noted in the case at bar (PA. 177), the district court decision in **Rios v. Enterprise Ass'n,** 400 F. Supp. 988 (S. D. N. Y. 1975), *aff'd in part and rev'd in part sub nom.* **EEOC v. Enterprise Ass'n,** 542 F. 2d 579 (2d Cir. 1976), *cert. denied,* 430 U. S. 911 (1977), did enter an injunction against an employer association, ordering it to undertake rather nebulous affirmative action. However, contrary to the suggestion of the District Court in the case at bar (PA. 177-179), the court of

or most of the courts of appeals in cases arising under the National Labor Relations Act have ruled, that an employer is liable only if it knew or had reason to know of the Union's discrimination. *See, e.g.*, **Lummus Co. v. NLRB**, 339 F. 2d 728 (D. C. Cir. 1964) (absolving employer of liability because it did not know and could not reasonably have known the reason why the charging party was not hired); and **NLRB v. Master Stevedores Association**, 418 F. 2d 140 (5th Cir. 1969) (absolving employers of liability because of lack of knowledge).[5] *Cf.* **Gaynor v. Rockefeller**, 15 N. Y. 2d 120, 204 N. E. 2d 627, 632 (1965) (requiring proof of knowledge or notice). In any event, the District Court's imposition of strict liability without regard to the contractors' intent, knowledge or reason to know was clearly improper.

A. The Union Was Not the Agent of the Employers.

The crux of the District Court's opinion was its conclusion that the Union in operating the hiring hall was acting as the employers' "agent." PA. 191. Under every test of agency, however, the District Court was wrong.

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4. (Cont'd.)

appeals' decision in **Rios** does not support the decisions below, since the association in **Rios** did not appeal the injunction. Rather, the appeals were taken only by the union and by the plaintiffs.

5. *But see* **Morrison-Knudsen Co. v. NLRB**, 275 F. 2d 914, 917 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961), on which the District Court heavily relied and which the District Court construed as imposing strict vicarious liability on employers (PA. 170-71). In fact, **Morrison-Knudsen** does not impose liability on an employer irrespective of whether it knew or had reason to know of a union's discrimination. *See* 275 F. 2d at 917, where the court in **Morrison-Knudsen** stated that the employers "knew of the collection of 'dobie,'" the unlawful license fee. The Fifth Circuit likewise noted in **NLRB v. Master Stevedores Assoc.**, 418 F. 2d 140, 142 (5th Cir. 1969), that the employer in **Morrison-Knudsen** in fact had knowledge.

The Restatement (Second) of Agency, § 1(1), defines "agency" as follows:

> Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control,* and consent by the other so to act.

(Emphasis added). *See also id.*, § 14 ("A principal has the right to control the conduct of the agent with respect to matters entrusted to him"). Thus, one of the key tests of the existence of an agency relationship—and, consequently, of *respondeat superior* liability—is the existence of a right of control. *See, e.g.*, **Steele v. Armour & Company**, 583 F. 2d 393 (8th Cir. 1978) (defendant not vicariously liable because it lacked the right to control "the means and manner of service" of the alleged agent); **NLRB v. Local No. 64, Falls Cities District Council**, 497 F. 2d 1335 (6th Cir. 1974) (union not liable for discrimination by the district council, to which the union had delegated responsibility for issuing work permits, because the union did not have the right to control the district council's issuance of work permits). There simply was no right of control in the present case.

First, a right of control would be contrary to one of the most fundamental precepts of federal labor law, *i.e.*, that there must be an arm's length relationship between an employer and a union. *See, e.g.*, section 8(a)(2) of the National Labor Relations Act, 29 U. S. C. § 158(a)(2), which expressly outlaws employer domination and control of labor organizations, and section 302 of the Taft-Hartley Act, 29 U. S. C. § 186, which prohibits an employer from paying money "or other thing of value" to any labor organization, with certain limited and strict exceptions (*e.g.*, payments to joint union-management trust funds). As one

court stated in rejecting the principle of vicarious liability adopted by the courts below:

> But a flat declaration of principal-agent relationship is not enough in these cases. *"Respondeat superior"* is premised upon the proposition that the agent is under the complete control of the principal within the area of the agent's authority. But this broad generality cannot be applied without specification in the labor relations field. The basic thesis for the whole of modern thought in this area is that the representative of the employees is not, cannot be, and must not be under the complete control of the employer.

Lummus Co. v. NLRB, 339 F. 2d 728, 735 (D. C. Cir. 1964).

Second, practical considerations militate against the existence of a right to control. Counsel for Respondents conceded below that it would be difficult for a contractor to know that the Union was not complying with the out-of-work lists "because they don't presumably have the out-of-work list in front of them" (JA. 332).[6] United is frankly mystified as to how it could be expected to control the Union's referral practices when the lists from which the referrals were supposed to be made were in the Union's possession, many miles from the job site. Furthermore, even if the contractors had known that the Union was discriminatorily deviating from the list system, the District Court offered no explanation as to how the contractors could have compelled Union adherence to the contract and the law. Requiring the employers to institute legal action against the Union would make no sense, not only

6. Under the collective bargaining agreement, referrals were supposed to be made in accordance with out-of-work lists maintained by the Union. PA. 24-26.

because such a requirement would conflict with the federal policy encouraging harmonious labor-management relations, but also because the employer would lack standing to sue the Union for discrimination against minorities. *See, e.g.*, **Simon v. Eastern Kentucky Welfare Rights Organization,** 426 U. S. 38 (1976) (plaintiff himself must have suffered actual injury to have standing); **Tileston v. Ullman,** 318 U. S. 44 (1943) (a plaintiff may not sue to redress injuries to others); **Foust v. Foremost-McKesson, Inc.,** 10 BNA FEP Cases 322 (N .D. Calif. 1975) (employer is not an "aggrieved" person and thus cannot sue under Title VII).

Third, the key weapon a principal has in exercising control over an agent—a right of termination at will [7]—

7. Under agency law, a principal has an absolute right to terminate an agent's authority even in the face of a contractual agreement purporting to make the authority irrevocable. *See* Restatement (Second) of Agency § 118, Comment (b), and § 105, Topic I. The right to revoke the agent's authority by discharging him is a critical factor establishing the existence of an agency relationship. *See, e.g.*, **Wardle v. Central States, Southeast and Southwest Areas Pension Fund,** 627 F. 2d 820, 824 (7th Cir. 1980); **Shapiro v. Ribicoff,** 316 F. 2d 262, 263 (2d Cir. 1963); **McLeod v. Dean,** 270 F. Supp. 855, 857 (S. D. N. Y. 1967) ("Indeed it has been said that no single fact is more conclusive, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself"); **Catalano v. United States,** 293 F. Supp. 1300, 1306 (E. D. La. 1968) ("In a true agency relationship, the authority of the agent can be revoked at any time by the principal without the agent's consent"). The absolute right of revocation is essential, for without it the alleged principal cannot control the conduct of the alleged agent. *See, e.g.*, **Malloy v. Fong,** 37 Cal. 2d 356, 232 P. 2d 241, 249 (1951) ("The power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities. 'The right to immediately discharge involves the right of control.' ").

was lacking. The National Labor Relations Board, with the approval of at least one court, has frequently found that an employer's refusal to comply with the terms of a collective bargaining agreement constitutes an unlawful refusal to bargain in violation of section 8(a)(5) of the Act, 29 U. S. C. § 158(a)(5). *See, e.g.*, **Arco Electric Co. v. NLRB**, 618 F. 2d 698 (10th Cir. 1980); **Rego Park Nursing Home**, 230 N. L. R. B. 725 (1977); **Home Roofing Co.**, 211 N. L. R. B. 910 (1974). Indeed, in one case the Labor Board specifically held that an employer violated section 8(a)(5) by refusing to comply with an exclusive hiring hall provision in its collective bargaining agreement, and ordered the employer to comply with that provision: **Paint Power, Inc.**, 230 N. L. R. B. 758 (1977). Moreover, the fact that the union may have discriminated provides no defense to a refusal-to-bargain charge. *See, e.g.*, **Bell & Howell Co.**, 230 N. L. R. B. 420 (1977), *aff'd*, 598 F. 2d 136 (D. C. Cir. 1979); **R. C. Cobb, Inc.**, 231 N. L. R. B. 99 (1977) (discrimination by union hiring hall provides no defense to refusal to bargain charge). Consequently, the National Labor Relations Act "locked" the employers into their relationship with the Union and deprived them of the ability to control the Union by denying them the freedom to revoke at any time the Union's authority to refer operating engineers to them.

The District Court's imposition of vicarious liability on the contractors also is inconsistent with this Court's decision in **Carbon Fuel Co. v. United Mine Workers**, 444 U. S. 212 (1979). This Court there held that an international union, which was a party to a collective bargaining agreement with the company, was not liable for the unauthorized strikes of its locals. The Court so held even though the contract contained a no-strike clause and a clause requiring the international to "maintain the integrity of [the] contract," and even though the international con-

stitution required local unions to obtain authorization from the international before striking. *Id.* at 218. Despite these indicia of control, this Court held that the company "failed to prove agency" because of the lack of evidence that the international "instigated, supported, ratified, or encouraged any of the work stoppages." *Id.* This Court also specifically rejected the employer's contention that the international had a duty to use "reasonable means" to control its local's actions.

The District Court ignored the above factors and instead found the contractors vicariously liable because they "retained power to oppose the union discrimination" (PA. 193 n. 61). However, the "power to oppose" is not the same as a "right of control." If the power to oppose union discrimination were all that were necessary to establish a right of control, the plaintiffs—as third party beneficiaries of the contract and as persons who could have filed grievances thereunder—would have just as much "right of control" over the Union as the contractors had. No one seriously can contend that the plaintiffs had a right to control the Union.[8] Moreover, the District Court's rationale is in direct conflict with this Court's reasoning in **Carbon Fuel,** which made clear that *respondeat superior* liability cannot be imposed for failure to exercise "reasonable means" of control where in fact a common-law agency relationship does not exist.

Finally, the imposition of vicarious liability on the employers in this case violates another principle of agency law, *i.e.*, that agency is a consensual relationship. *See*

8. The District Court's reliance on the existence of a non-discrimination clause in the collective bargaining agreements after May 1971 to find the existence of a right of control (PA. 192 & 193 n. 61) is without any basis in law or reason and inevitably would have the effect of dissuading employers and unions from agreeing to such clauses—a result that hardly would be consistent with public policy.

Restatement (Second) of Agency, § 15. The evidence is uncontradicted that the exclusive hiring hall provision in the case at bar became part of the industry-wide collective bargaining agreements only because the Union struck for 10 weeks in 1961 (PA. 23; JA. 306-308). The Union struck again for approximately 10 weeks in 1963, when the contractors sought to have the exclusive hiring hall provision removed from the contract (JA. 310). To deem "consensual" the relationship between the Union and the contractors would be to engage in a fiction which ignores not only the reality of collective bargaining in general, but the specific conduct of the Union in this case.

B. The District Court Improperly Ruled That the Contractors Had an "Affirmative Duty" to Prevent Discrimination.

Underlying much of the District Court's imposition of vicarious liability was its expansive and novel view of 42 U. S. C. § 1981, which it construed not only as permitting a finding of liability without regard to discriminatory intent (PA. 167, 183), but also as imposing affirmative obligations on the employers. Specifically, the District Court believed that the duty imposed by section 1981 was "to see that discrimination does not take place" (PA. 194) and was "an 'affirmative duty' to prevent discrimination" (PA. 186).

An employer's only duty under section 1981, however, is to ensure that neither it nor its agents subject to its control engage in intentional discriminatory acts. *See, e.g.*, **Guardians Association v. Civil Service Commission**, 633 F. 2d 232, 263-68 (2d Cir. 1980); **Craig v. County of Los Angeles**, 626 F. 2d 659 (9th Cir. 1980), *cert. denied*, 450 U. S. 919 (1981).[9] Indeed, recent decisions of this Court

9. In order to avoid unnecessary duplication of identical arguments, United will not address in further detail the question

make clear that not even Title VII imposes on an employer an "affirmative duty" to prevent discrimination. *See, e.g.*, **Texas Department of Community Affairs v. Burdine**, 450 U. S. 248, 259 (1981) (Title VII does not require an employer "to restructure his employment practices to maximize the number of minorities and women hired"), and **Furnco Construction Corp. v. Waters**, 438 U. S. 567, 577-78 (1978) ("Title VII prohibits [an employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees"). In short, the federal anti-discrimination laws merely impose liability on entities that discriminate; they do not create the obligations of an insurer.

The only cases cited by the District Court in support of its "affirmative duty" analysis are clearly inapplicable.[10] First, each was decided prior to **Burdine** and **Furnco**. Moreover, each was premised on the "disparate impact" theory of Title VII. The theory of those cases was that an employer was liable for the disparate impact created by a collective bargaining provision perpetuating the effects of prior discrimination by that employer.[11] However, whatever "affirmative obligation" an employer may have under

9. (Cont'd.)

whether § 1981 requires proof of discriminatory intent, but instead will incorporate by reference the argument on that issue presented by Bechtel Power Corp., Petitioner in Case No. 81-333.

10. **Myers v. Gilman Paper Corp.**, 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977); **Carey v. Greyhound Bus Co.**, 500 F. 2d 1372 (5th Cir. 1974); **Johnson v. Goodyear Tire & Rubber Co.**, 491 F. 2d 1364 (5th Cir. 1974); **Robinson v. Lorillard Corp.**, 444 F. 2d 791 (4th Cir.), *cert. denied*, 404 U. S. 1006 (1971).

11. **Myers**, *supra*, 544 F. 2d at 850; **Carey**, *supra*, 500 F. 2d at 1377; **Johnson**, *supra*, 491 F. 2d at 1381; **Robinson**, *supra*, 444 F. 2d at 797-800.

Title VII to ensure that *its* collective bargaining agreement does not perpetuate the effects of *its* prior discrimination has no relevance to the case at bar. First, liability against the contractors in this case is premised exclusively on 42 U. S. C. § 1981, which (as the brief of co-petitioner Bechtel Power Corp. in Case No. 81-333 has demonstrated) requires proof of discriminatory intent by the contractors. Second, the contractors were not found liable because of an illegal provision in a contract, but rather because of the Union's failure to comply with the contract. Thus, the District Court's assertion that the contractors could not use the contract "as a shield" (PA. 194) misconstrued the contractors' argument. The contractors are not seeking to use the contract as a "shield," but rather are saying that they should not be held responsible for the Union's contractual violations which the contractors could not prevent.

The District Court's reliance on Section 214 of the Restatement (2d) of Agency[12] is likewise misplaced. Even if the Union were the employers' agent, that provision, by its express terms, applies only to a principal "under a duty to provide protection for or to have care used to protect others of their property." Traditionally, the principle embodied in that section has applied only to recognized special duties of care, such as those imposed on common carriers. *Compare* **O'Brien v. Public Service Taxi Co.**, 178 F. 2d 211, 213 (3d Cir. 1949) (common carrier liable for assault by its driver), *and* **St. Michelle v. Catania T/A Diamond Cab Co.**, 252 Md. 647, 250 A. 2d

12. Section 214 provides:

A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

874 (1969) (same), *with* **Bowman v. Home Life Insurance Co. of America**, 243 F. 2d 331, 333 (3d Cir. 1957) (employer not liable under section 214 for conduct of agent who posed as doctor.) Even if (contrary to United's position) 42 U. S. C. § 1981 might permit liability without regard to intent, it certainly does not impose an affirmative duty to "provide protection."

C. The Decisions Below Conflict With Federal Labor Policy and Place the Employers in an Impossible Dilemma.

Federal labor law expressly approves and encourages the use of union hiring halls by employers as a source of securing workers. In **Local 357, International Brotherhood of Teamsters v. NLRB**, 365 U. S. 667 (1961), this Court observed that hiring halls serve as a means "'to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers,'"[13] and held that facially neutral hiring hall agreements (such as the one in the case at bar) are lawful under the National Labor Relations Act. Following this Court's decision in *Local 357*, a body of labor law developed which has assisted labor unions in their efforts to persuade employers to agree to and comply with hiring hall provisions. A nondiscriminatory union-operated hiring hall provision is a mandatory subject for collective bargaining,[14] and, as noted above, a union's discriminatory conduct does not justify an employer's conduct in refusing to bargain with the union.

13. 365 U. S. at 672, quoting **Mountain Pacific Chapter**, 119 NLRB 883, 896 n. 8 (1957).

14. **Houston Chapter, Associated General Contractors**, 143 N. L. R. B. 409 (1963), *enf'd*, 349 F. 2d 449 (5th Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966).

The decisions in the case at bar, however, seriously undermine the utility of hiring halls, impose strong conflicting obligations on employers, and create enormous uncertainty in industries where hiring halls are widely used. By imposing strict liability on the contractors regardless of whether they knew or had reason to know of the Union's discriminatory referral practices, the decisions below leave employers no choice but to refrain from resorting to any hiring hall and to suffer a virtually certain strike by resisting, to the point of impasse, union demands for hiring hall provisions.

No other course of action will be available to the employers realistically. As noted above, they have no practical or legal means of exercising control over the hiring hall. Furthermore, contractors cannot be expected to prevent, or attempt to prevent, discriminatory practices of which they neither are aware nor have any reason to be aware. Finally, employers with exclusive hiring hall contracts (as in the case at bar) cannot hire minorities outside the hiring hall, since to do so would be both an unfair labor practice and a breach of the collective bargaining agreement, which could justify either a strike or a damage action under section 301 of the Labor Management Relations Act, 29 U. S. C. § 185.

The obvious inadequacy of these alternatives leaves only one option open to the contractors—resistance to a union's demand for a hiring hall provision. Resistance to such a demand, however, can only lead to increased labor strife. That fact is graphically illustrated by the case at bar, where Local 542 struck for ten weeks in 1961 and again in 1963 precisely for the purpose of forcing the present exclusive hiring hall system on the contractors (PA. 23; JA. 306-308, 310). Thus, by making it imperative for employers to resist union hiring hall demands, the decisions below create a substantially increased risk of work

stoppages and thereby conflict with a major goal of federal labor policy, encouragement of the peaceful resolution of labor disputes. *See, e.g.*, **Boys Markets, Inc. v. Retail Clerks Union, Local 770**, 398 U. S. 235, 251 (1970) ("As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes").

D. The Contractors Cannot Be Held Vicariously Liable for the Union's Entry Practices.

Plaintiffs in this case alleged and proved that the Union discriminated against minorities both with respect to referrals of union members and with respect to admission to the Union in the first place. United argued below that under no circumstances could the employers be held vicariously liable for the Union's discriminatory *entry* practices, but the District Court did not specifically address the distinction between vicarious liability for referral practices and vicarious liability for entry practices. Although the opinion appears directed towards vicarious liability only for referral practices,[15] United will briefly address the question of vicarious liability for entry discrimination because of Respondents' apparent position that the contractors are liable for both types of discrimination.

Much of what has been said with regard to vicarious liability for referral discrimination applies with equal force

15. The principal case upon which the District Court relied—Morrison-Knudsen Co. v. NLRB, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961)—was a referral case. Moreover, the District Court's opinion—which imposed liability on the contractors for "the Union's conduct in operating the hiring hall" (PA. 167)—suggests only vicarious liability for referral discrimination.

to entry discrimination. However, imposition of vicarious liability for the latter type of discrimination is even less justified than for the former. First, none of the cases cited by Respondents in this litigation or by the District Court even intimated that a contractor can be liable because of discrimination by a union against persons seeking to become a member of the union. Rather, the only question discussed in the case law is whether, and under what circumstances, a contractor may be liable because of a union's discriminatory *referral* practices.

Second, it would be completely untenable to hold that the Union was the contractors' "agent" for determining who is admitted into the Union. There is simply no basis for concluding that a contractor "delegated" to the Union any responsibility for determining union membership, and the Union clearly was not acting on behalf of the contractors in determining its own membership. Furthermore, there is no basis whatsoever for a contractor to exercise control over a union's membership practices. The collective bargaining agreement between the employers and the Union governed only the referral practices, not the means by which persons could become members of the Union.

Thus, under no circumstances should the contractors be held vicariously liable for entry discrimination.

II. The Judgment and Decree Should Be Reversed With Respect to Petitioner Because There Was a Complete Failure of Proof of Discrimination.

Assuming *arguendo* that a contractor can be held vicariously liable for a union's discrimination irrespective of whether the contractor knew or had reason to know of that discrimination, the District Court's Judgment and Decree still should be reversed with respect to United. In **International Brotherhood of Teamsters v. United States,**

431 U. S. 324 (1977), this Court held that, in order to find an employer liable to a plaintiff class in an employment discrimination case, the plaintiffs must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336. This Court further held that "a court's finding of a pattern or practice justifies an award of prospective relief," such as "an injunctive order." *Id.* at 361.

Consistent with this Court's decision in **Teamsters**, the lower federal courts likewise have held that liability for racial discrimination depends on proof of discrimination in the selection of the work force of the employer held liable. *See, e.g.*, **Townsend v. Nassau County Medical Center**, 558 F. 2d 117, 120 (2d Cir. 1977), *cert. denied*, 434 U. S. 1015 (1978) ("We do not believe that a statistic relating only to the general population, and not to the employment practices of the particular defendant, should be sufficient to raise such a presumption" of illegality); **EEOC v. Navajo Refining Co.**, 593 F. 2d 988, 992 (10th Cir. 1979); **Jarrell v. Eastern Air Lines, Inc.**, 430 F. Supp. 884, 892 (E. D. Va. 1977), *aff'd per curiam*, 577 F. 2d 869 (4th Cir. 1978); and **Jackson v. Curators of University**, 456 F. Supp. 879, 881 (E. D. Mo. 1978). Indeed, only a year ago, the Court of Appeals for the Third Circuit aligned itself with these decisions by holding that, regardless of whether a policy has a disparate impact on the community at large, an employer is not liable unless the impact is manifested in the employer's own work force. **EEOC v. Greyhound Lines, Inc.**, 635 F. 2d 188, 192-93 (3d Cir. 1980).

In the case at bar, however, United (together with all 1,400 other contractors in the defendant class) was subjected to an injunctive order requiring it to award prospective relief to the plaintiff class members, *despite*

the fact that there was no finding of any pattern or practice of discrimination in the selection of United's work force or any finding of an underutilization of minorities by United. Indeed, as noted above, United's employment statistics were never even received in evidence, and another contractor (Barger, Inc.) with a workforce that was at least 50% minority was also held liable and bound by the injunction (JA. 126-129, 134).

Neither the District Court nor Respondents have cited any case in which an employer was ordered to provide class-wide prospective relief in the nature of mandatory hiring quotas in the absence of a finding that the employer so enjoined had a statistically significant underutilization of minorities in its workforce and that such underutilization was attributable to racial discrimination. To affirm the imposition of hiring quotas on United in the face of this complete failure of proof would violate the well established rule that "federal courts . . . are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." **Northwest Airlines, Inc. v. Transport Workers Union,** — U. S. —, 101 S. Ct. 1571, 1582 (1981).

III. The Defendant Class Certification Was Improper.

A. The Commonality and Typicality Requirements of Rule 23 Were Not Met.

Subdivisions (2) and (3) of Rule 23(a) require, respectively, that there be "questions of law or fact common to the class" and that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." In concluding that the commonality and typicality requirements of Rule 23(a) were satisfied, the District Court reasoned that the only issue before it at the liability stage was the pure legal question of whether a contractor can be liable for discrimination by a union-operated hiring hall.

If that indeed were the only question before the District Court, commonality and typicality might be present. However, a court cannot hold a litigant liable and enter a mandatory injunction against it merely upon resolution of an abstract legal question. The power of a court to find a litigant liable and to enter an injunction against it must depend upon a finding that that litigant has violated the law. As pointed out in Part II *supra*, a court cannot properly find liability or enter a mandatory injunction against a contractor without finding that there in fact was discrimination in the selection of *its* work force. Furthermore, as pointed out in Part I, *supra*, the District Court erred in finding liability in the absence of proof that the contractors themselves intentionally discriminated against minorities on the basis of race.

In short, assuming *arguendo* that a contractor can properly be held vicariously liable for a union's discrimination, United and the other employers still cannot be held liable or ordered to take affirmative action without resolution of at least the following questions:

1. Is there a statistically significant underutilization of minorities in the work force of each contractor sought to be held liable?

2. If there is such an underrepresentation of minorities in the work force of a particular contractor, what are the reasons for it? Specifically, is the underutilization due to discriminatory referrals by the Union, or rather is it due to legitimate, nondiscriminatory factors such as (a) geographic location of job sites, (b) nondiscriminatory use of the Group I, II and III classification system,[16] the special

16. (JA. 245). This classification system establishes priorities for work based upon previous amount of work. If such system were administered in a *bona fide*, nondiscriminatory manner with respect to a particular contractor, that contractor would not be

skills provision, or the 90-day recall provision,[17] (d) non-discriminatory discharges for just cause, etc.?

3. Was the contractor an active participant in the Union's discrimination? *Cf.* **Byrd**, *supra*, and **McFadden**, *supra*.

4. Alternatively, did the contractor have knowledge that the Union discriminated against minorities, and did it acquiesce in the Union's discriminatory practices?

Obviously, the above issues cannot be determined on a class basis, since they are individual—not class—questions. For example, whether there was an underutilization of minorities in the work force of Glasgow, Inc. (the class representative) is not a common question with whether there was an underutilization in *United's* work force. Similarly, whether Glasgow knew of the Union's discrimination is not in common with whether United knew of such discrimination. *See, e.g.*, **Kline v. Coldwell, Banker & Co.**, 508 F. 2d 226 (9th Cir. 1974), *cert. denied*, 421 U. S. 963 (1975), in which the court of appeals reversed a dis-

16. (Cont'd.)
liable even if such system caused an under-representation of minorities. *See* **California Brewers Ass'n v. Bryant**, 444 U. S. 598 (1980); **International Brotherhood of Teamsters v. United States**, 431 U. S. 324 (1977).

17. (JA. 245). The special skills provisions of the collective bargaining contracts permitted hiring out of order where the employer had jobs requiring special skills. A particular contractor might be able to prove that its projects required persons with special skills and that there were few available minority operating engineers with the requisite special skills. The 90-day recall provision of the contract permits contractors to recall operating engineers laid off within the previous 90 days without going through the hiring hall. This provision may be of particular importance to contractors having long-term employees or relatively steady work.

trict court order that had permitted an antitrust action against real estate brokers in Los Angeles to proceed as a defendant class action. After stating that "membership liability is inherently an individual question," the court held:

> Plaintiffs have also misused the "Adherence" theory. Under this approach if Broker A receives the fee schedule and follows it in his pricing, Broker A would be liable as having adhered to the conspiracy. *The fact that Broker A has adhered does not, however, prove that Broker B did so. Nor does the fact that a "substantial" number of brokers adhered prove that Broker B did so also. . . . Each defendant is clearly entitled to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or, perhaps, some other yet unknown defense.*

508 F. 2d at 233 (emphasis added).[18]

In sum, a defendant class action is improper for determining such questions as knowledge, participation and minority utilization by the defendant class members. Because the District Court incorrectly concluded that it could adjudicate liability and enter a mandatory injunction with-

18. Other cases denying certification of defendant classes because of individualized questions among the defendant class members include: **Contract Buyers League v. F & F Investment**, 48 F. R. D. 7, 12 (N. D. Ill. 1969) (suit against sellers of real estate for racial discrimination, conspiracy, overreaching and fraud); **Coniglio v. Highwood Services, Inc.**, 60 F. R. D. 359, 363-64 (W. D. N. Y. 1972), *aff'd*, 495 F. 2d 1286 (2d Cir. 1974) (suit against class of professional football clubs challenging tie-in and price-fixing practices); and **Manning v. Princeton Consumer Discount Co., Inc.**, 390 F. Supp. 320, 324 (E. D. Pa. 1975), *aff'd*, 533 F. 2d 102, 104 (3d Cir. 1976), *cert. denied*, 429 U. S. 865 (1976) (suit against automobile sellers for alleged violations of Truth-in-Lending Act).

out considering such questions, its certification of the defendant class was erroneous and should be vacated.

B. Glasgow Is Not an Adequate Representative of the Class.

Rule 23(a)(4) requires the court to determine that "the representative parties will fairly and adequately protect the interests of the class." In **Wetzel v. Liberty Mutual Insurance Co.**, 508 F. 2d 239, 247 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1975), the Court of Appeals stated (in a plaintiff class action):

> Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

See also **East Texas Motor Freight System, Inc. v. Rodriguez**, 431 U. S. 395, 403 (1977) (requiring the class representative to have the "same interest" as the class members), and **General Telephone Company of the Northwest, Inc. v. EEOC**, 446 U. S. 318, 331 (1980) (holding that a Rule 23 class action must be free of conflicts of interest).

As an outsider to this litigation, United has not been able to assess fully the adequacy of the representation it has received from the named defendant's attorneys.[19] Thus, except to the extent indicated below, the principal thrust of its argument is that Glasgow's interests are antagonistic to those of the defendant class members.

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19. Absent class members are not required to monitor the course of the proceedings in order to determine whether their interests are being adequately represented, but may attack the judgment collaterally, after termination of the suit, by showing that their representation has been inadequate. *See, e.g.*, **Gonzales v. Cassidy**, 474 F. 2d 67 (5th Cir. 1973); **Wetzel**, *supra*, 508 F. 2d at 248-49.

First, antagonism of interest is apparent from the competitive nature of the construction industry. Numerous courts have held that classes, both plaintiff and defendant, are improper where the class members are competitors, since their competitive relationship inherently creates antagonistic interests.[20]

Second, because the Respondents are seeking relief from all members of the defendant class as well as from the named defendants, it is obviously in the interest of the named defendants to have as many contributors to the plaintiffs' recovery as possible. This conflict of interest became blatantly apparent shortly after the District Court issued its Judgment and Decree. That Judgment and Decree requires, in pertinent part, that the "defendants" pay certain costs of its implementation (*e.g.*, the costs of the master, of notification to the class members, and of the training program). *See* PA. 284; JA. 405-06, 408-09. Glasgow has consistently taken the position that, if it should have to bear any such costs, all members of the defendant class likewise should have to bear such costs. The District Court rejected that contention and imposed 5 per cent of the costs on Glasgow but no costs on the defendant class members (PA. 285). Glasgow appealed that ruling to the Court of Appeals, but without success. Glasgow's efforts to impose liability for costs on the defendant class members clearly makes it an inadequate class representative.

Glasgow also is an inadequate representative because it neither has any interest in, nor is capable of, litigating the

20. *See, e.g.*, **Winokur v. Bell Federal Savings & Loan Association**, 16 F. R. Serv. 2d 65, 69 (N. D. Ill. 1972) (defendant class); **William Goldman Theatres, Inc. v. Paramount Film Distributing Corp.**, 49 F. R. D. 35, 40-41 (E. D. Pa. 1969); **Philadelphia Electric Co. v. Anaconda American Brass Co.**, 43 F. R. D. 452, 463 (E. D. Pa. 1968); **Al Barnett & Son, Inc. v. Outboard Marine Corp.**, 64 F. R. D. 43, 50 (D. Del. 1974).

individual defenses of the class members referred to above. *See* **Sommers v. Abraham Lincoln Federal Savings and Loan Association**, 66 F. R. D. 581, 593 (E. D. Pa. 1975), which stated: "[I]t is difficult to imagine what interest the named defendants would have in proving that an absent defendant did not conspire in violation of the antitrust laws. The interest of a named defendant would seem to be limited to defending against the claim that it so conspired." *Cf.* **East Texas'** "same interest" test. Similarly, with respect to the "adequacy of counsel" requirement, the burden on any single law firm—faced with the responsibility of adequately preparing and litigating, for all 1400 defendant class members, the individual defenses noted in Part III(A) *supra*—would be insurmountable. Because the District Court erred in overlooking the necessity to address those individual defenses before holding the defendant class members liable and ordering them to undertake affirmative action for minorities, its certification of the defendant class was improper.

IV. The District Court Improperly Concluded That It Had Personal Jurisdiction Over the Members of the Defendant Class.

Neither United nor any other defendant class member was named as a defendant in the complaint and summons, nor was any of them served with process. Nevertheless, the District Court purported to adjudicate the liability of all defendant class members. It also imposed extensive personal obligations on them, requiring each to meet ambitious hiring goals, including (where necessary) the hiring and training of unskilled minorities. United submits that the District Court erred in taking such action, since it lacked personal jurisdiction over the defendant class members. United further submits that the District Court erred in concluding that it had such jurisdiction over

United and the other defendant class members because of the defendant class nature of the action.

Perhaps no principle in Anglo-American jurisprudence is better established than the principle that a court cannot obtain personal jurisdiction or adjudicate a personal claim or obligation unless the litigant sought to be held liable was designated as a party[21] and was served with process. As this Court held in **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 395 U. S. 100, 110 (1969):

> The Court of Appeals was quite right in vacating the judgments against Hazeltine. It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U. S. 32, 40-41 (1940). The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E.g., Pennoyer v. Neff*, 95 U. S. 714 (1878); *Vanderbilt v. Vanderbilt*, 354 U. S. 416, 418 (1957).
>
> Here, Hazeltine was not named as a party, was never served and did not formally appear at the trial.

The hornbook rule set forth in **Zenith** cannot be disregarded merely because the action has been certified as a defendant class action. The one case cited by the District

21. Under the Federal Rules of Civil Procedure, a litigant is designated a party only if it is named in the complaint and summons. *See* Fed. R. Civ. P. 4(b) and 10(a). United was not named as a party in either the summons or complaint. There is ample authority that class members are not parties to the litigation. *See, e.g.*, **Donson Stores, Inc. v. American Bakeries Co.**, 58 F. R. D. 485, 488-89 (S. D. N. Y. 1973); **In re Sugar Industry Antitrust Litigation**, 73 F. R. D. 322, 349 (E. D. Pa. 1976).

Court for its conclusion that it had personal jurisdiction over the defendant class members—**Hansberry v. Lee**, 311 U. S. 32 (1940) (PA. 212)—does not support the District Court's conclusion. Rather, **Hansberry** merely stated that absent defendant class members could be bound as a matter of *res judicata* by a judgment adverse to the class. The question before the Court in **Hansberry** was whether an earlier decree, which had held that a racially restrictive covenant was valid, was *res judicata* and thus barred the defendants in a later suit from contesting the validity of the covenant.[22] Nothing in **Hansberry** even remotely suggests that a court has personal jurisdiction over members of a defendant class or can adjudicate their liability.[23]

Other cases ignored by the District Court, such as **Christopher v. Brusselback**, 302 U. S. 500 (1938), support

22. The Court held that the prior decree was *not res judicata* because of the inadequacy of representation during the prior proceeding.

23. Other decisions of this Court likewise have held that a defendant class action may "bind" the defendant class members, but such decisions are not support for the District Court's ruling that certification of a defendant class confers personal jurisdiction for the purpose of adjudicating liability and imposing a personal mandatory injunction on each of the class members. Thus, **Supreme Tribe of Ben-Hur v. Cauble**, 255 U. S. 356 (1921), held that a prior decree, which had ruled that the reorganization of a particular fraternal benefit organization was valid, barred relitigation of the validity of the reorganization in subsequent proceedings. **Smith v. Swormstedt**, 57 U. S. 288 (1854), merely held that a defendant class action was proper to determine whether ministers of the Southern branch of the Methodist church were entitled to their share of a fund established for Methodist preachers prior to the split of the church into Northern and Southern branches. The action thus was an *in rem* proceeding, and nothing in the opinion remotely suggests that the defendant class members (ministers of the Northern branch of the church) were being held personally liable to the Southern ministers, or that any attempt to hold them personally liable had been made.

United's contention that personal jurisdiction over it was lacking despite the defendant class certification. In Christopher, the plaintiffs sued to enforce a judgment they had obtained in an earlier action, which purported to determine the statutory liability of all of a particular bank's shareholders to its creditors. The defendants in the second suit had not been served with process in the prior action. Nevertheless, the plaintiffs contended that the defendants were bound by the earlier judgment under Equity Rule 38, the precursor to Rule 23. This Court rejected that contention. Noting that the controlling statute imposed a personal obligation on the shareholders, the Court held that the earlier suit did not adjudicate the rights of the absent class members, since only "a court having jurisdiction to render a judgment against them *in personam*" could rule on their liability. (302 U. S. at 502). Furthermore, the Court noted that the purpose of the Equity Rule "was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction." (*Id.* at 505). In short, where one seeks to adjudicate the personal liability of another, the former must obtain *in personam* jurisdiction over the latter. Such jurisdiction cannot be obtained through the class action device, but can be obtained only by naming the party as a defendant and serving him with process.

United's position is also supported by Professor Moore. His treatise states that defendant class actions have been permitted against members of unincorporated associations but that, "insofar as the action asserts individual liability of the members, it should be binding on the individuals named as defendants and duly served with process, but not upon other individual members." 3B J. Moore, *Federal Practice*, ¶ 23.11[2], at 23-2830. Moore also states that "[i]t seems that injunctive relief, while it may be granted on behalf of a class, cannot be granted

against a person over whom the court does not have in personam jurisdiction." *Id.* ¶ 23.40[6], at 23-313, citing United States v. T. I. M. E.-DC, Inc., 335 F. Supp. 246 (N. D. Tex. 1971) (court lacked personal jurisdiction over the members of the defendant class and thus could not issue an injunction against them).

The proper function of defendant class actions is exemplified by two patent infringement cases: Dale Electronics, Inc. v. R. C. L. Electronics, Inc., 53 F. R. D. 531 (D. N. H. 1971), 356 F. Supp. 1117 (D. N. H. 1973), *modified on other grounds*, 488 F. 2d 382 (1st Cir. 1973); and Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N. D. Ill. 1968).[24] Each case permitted suits against defendant classes, but did so only for the purpose of determining the validity of the patent at issue, holding that the question of liability for infringement had to be determined on a non-class basis. As the court in Dale stated, "the issue of infringement must be determined in individual actions on a case by case basis." (53 F. R. D. at 535). Similarly, the court in Technograph ruled that the question of infringement should not be determined on a class basis. (285 F. Supp. at 720). Thus, the only question which could be resolved on a class-wide basis is the question of the patent's validity, which was a necessary but preliminary step to an adjudication of personal liability for infringement.[25]

24. Not all patent infringement suits have held that defendant classes are appropriate. *See, e.g.*, Sperberg v. Firestone Tire & Rubber Co., 61 F. R. D. 70 (N. D. Ohio 1973); In re Yarn Processing Patent Litigation, 56 F. R. D. 648 (S. D. Fla. 1972); and Technitrol, Inc. v. Control Data Corp., 164 U. S. P. Q. 552 (D. Md. 1970).

25. As the court in Sperberg stated: "It would appear in those cases which have upheld a patent class action that the cases were in reality being consolidated pursuant to Rule 42, Fed. R. Civ. P. as to the issue of validity, rather than being tried as a true class action." (61 F. R. D. at 78).

If the plaintiff prevails on the question of the patent's validity, that question, and that question only, is *res judicata* and cannot be relitigated by absent class members in subsequent suits. But liability for infringement can be determined only on a case-by-case basis, in separate proceedings in which the individualized question of infringement is resolved.

Under these authorities, therefore, the District Court erred in finding United and the other defendant class members liable for discrimination and in imposing personal obligations on them. The most that any judgment in this case possibly could accomplish with respect to the defendant class members is that, in a subsequent proceeding, those class members would be collaterally estopped from relitigating common issues determined adversely to the class. Furthermore, the class members would not be barred even from relitigating common issues if a court in a subsequent action should determine that they were not adequately represented in the first action.[26] Viewed from this perspective, defendant class actions are not exceptions to the principle that personal jurisdiction is obtainable only through service of process, but rather are an extension of the doctrine of *res judicata* so that absent class members, as well as parties and their privies, may be barred from relitigating certain issues.[27] The courts below

26. *See* **Hansberry v. Lee**, 311 U. S. 32 (1940). It is clear that the court in the initial action cannot determine the *res judicata* effect of its own judgment, and that such effect can be determined only in a later proceeding. *See* the Advisory Note to the Proposed Federal Rules, reprinted at 39 F. R. D. at 106, and **Wetzel v. Liberty Mutual Insurance Co.**, 508 F. 2d 239, 248-49 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1975).

27. Even the application of *res judicata* principles to absent class members has been controversial, but it has been defended on the ground that such an extension is, in practical effect, no different than the principle of *stare decisis*. *See* Frankel, "Some

ignored these well-established limitations on defendant class actions, and accordingly the District Court's injunctive order should be vacated.

The requirements that a defendant be named as such in the complaint and be served with process are no mere formality. Service of a complaint and summons on a named defendant is the traditional means of notifying a litigant that he has been sued and that a judgment might be entered against him if he does not appear and defend. Any attorney given a copy of a complaint and summons served on his client will know on the basis of established precedent and procedure what his client's rights and obligations are.

By contrast, a member of a defendant class is placed in an impossible dilemma in deciding whether he should participate in the litigation. He never has been served with a complaint or summons informing him that he must appear and defend.[28] Furthermore, the little precedent

27. (Cont'd.)

Preliminary Observations Concerning Civil Rule 23," 43 F. R. D. 39, 46 (1967). However, to enter a judgment imposing personal obligations on a litigant is an entirely different matter. *Res judicata*, like *stare decisis*, merely precludes a party from relitigating certain issues. Entry of an injunction requiring contractors, *inter alia*, to hire and train specified percentages of minorities and subjecting them to the risk of contempt affects, by definition, interests which are uniquely personal.

28. While United and many other defendant class members were notified of the pendency of the action about two years after it was commenced (JA. 121-123), that notice neither informed the class members of any right to opt out of the class nor explained the basis of the Respondents' allegations against them. Moreover, unlike a summons, the notice did not inform the class members that they were obligated to respond to the complaint or notice or otherwise to defend the action. After receiving the notice, counsel for United wrote to the District Court on March 6, 1974, arguing that United "could not appropriately be bound by any

that exists holds that, as an unnamed member of the class, he has no obligation to do so. *See, e.g.*, **Gonzales v. Cassidy**, 474 F. 2d 67, 76 (5th Cir. 1973), where the court stated:

> The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his responsibility—it is the responsibility of the class representative to protect the interests of all class members.

See also **Donson Stores, Inc. v. American Bakeries Co.**, 58 F. R. D. 485, 489 (S. D. N. Y. 1973). The imposition of personal liability and a mandatory personal injunction on contractors who were never named as defendants or served with process and who under established precedent were under no obligation to appear and defend themselves clearly violated the contractors' right to due process of law.

V. The District Court Erred in Certifying the Defendant Class Pursuant to Rule 23(b)(2).

A class action must meet the requirements of one of the subdivisions of Rule 23(b) as well as all of the requirements of Rule 23(a). The District Court in this case certified the defendant class pursuant to subdivision (b)(2) of Rule 23,[29] thereby denying the defendant class mem-

28. (Cont'd.)

judgment entered against it in this case" and requesting copies of pleadings and discovery papers, etc. (JA. 124-125). The District Court did not respond to the letter.

29. That subdivision permits a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole."

bers the right to opt out of the class. *See* Rule 23(c)(2). United submits that the District Court's certification under subdivision (b)(2) was incorrect as a matter of law, and denied the class members due process of law.

A case squarely supporting United's contention is **Paxman v. Campbell**, 612 F. 2d 848 (4th Cir. 1980) (*en banc*), *cert. denied*, 449 U. S. 1129 (1981), which reversed one of the decisions on which the District Court relied.[30] In that case, the Court of Appeals for the Fourth Circuit held that, as a matter of law, a defendant class could not be certified under subdivision (b)(2) of Rule 23. As the court stated: "To proceed under 23(b)(2) against a class of defendants would constitute the plaintiffs as 'the party opposing the class,' and would create the anomalous situation in which the plaintiffs' own actions or inactions could make injunctive relief against the defendants appropriate." 612 F. 2d at 854. The Court of Appeals therefore directed that the unnamed members of the defendant class be dismissed from the case. *Id.*

Other cases holding that defendant class actions may not be certified under subdivision (b)(2) include: **Adashunas v. Negley**, 626 F. 2d 600, 604-05 (7th Cir. 1980) ("As Professor Moore has pointed out, the language of Fed. R. Civ. P. 23(b)(2) must be 'wrenched to fit' the concept of a defendant class if indeed the language can be stretched in that direction at all"), **Stewart v. Winter**, 87 F. R. D. 760, 770 (N. D. Miss. 1980), and **Mudd v. Busse**, 68 F. R. D. 522, 530 (N. D. Ind. 1975).[31] *See also* 7A Wright

30. **Paxman v. Wilkerson**, 390 F. Supp. 442 (E. D. Va. 1975), discussed by the District Court at PA. 203-04.

31. United acknowledges that a number of lower courts have permitted certification of defendant classes under subdivision (b)(2). *See, e.g.*, **Marcera v. Chinlund**, 595 F. 2d 1231, 1238 n. 10 (2d Cir.), *vacated on other grounds*, 442 U. S. 915 (1979), and the cases cited by the District Court at PA. 203-04. However, a review of those decisions reveals virtually no discussion of the objections raised herein.

& Miller, **Federal Practice & Procedure**, § 1775, at 21-22, and 3B J. Moore, **Federal Practice**, ¶ 23.40[6], at 23-310, on which the above cases relied. *See also* **Appleton Electric Co. v. Advance-United Expressways**, 494 F. 2d 126, 140 & n. 28 (7th Cir. 1974) (permitting a (b)(3) defendant class so that the class members would have the right to opt out).

Even if (despite these authorities) a defendant class ever could be proper under Rule 23(b)(2), (b)(2) certification of the defendant class in the case at bar was error. Subdivision (b)(2) permits a class action where "the party *opposing* the class has acted or refused to act on grounds generally applicable to the class, *thereby* making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." (Emphasis added). In the context of this case, there can be no basis for concluding that "the party opposing the class" (*i.e.*, the *plaintiffs*) "has acted or refused to act on grounds generally applicable to the class" (*i.e.*, to the class of *defendants*), or that the actions or refusals to act on the part of the plaintiffs "*thereby*" make injunctive or declaratory relief appropriate.

The District Court acknowledged the linguistic difficulties in applying subdivision (b)(2) to the defendant class, but concluded that "where . . . a class of plaintiffs is forced, if they wish to be employed as operating engineers, to act with respect to the defendant class of employers in one and only one way, the requirements of 23(b)(2) are met." (PA. 203). This construction is erroneous for three reasons.

First, subdivision (b)(2) by its express language requires an analysis of the actions or refusals to act by the party *opposing* the class. However, the District Court's formulation did not focus on the actions of the party opposing the class (*i.e.*, the plaintiffs), but rather on the actions of the defendant class members themselves, which

allegedly "forced" the plaintiffs to act in one way. Second, it did not explain how plaintiffs' actions "thereby" made injunctive relief appropriate. Finally, the District Court's formulation is a classic bootstrap conclusion which effectively deprives subdivision (b)(2) of any independent meaning. In essence, what the District Court held was that the requirements of subdivision (b)(2) were met by virtue of the fact that the plaintiffs alleged that they were aggrieved by the defendant class members' practices. Such a construction would render a (b)(2) defendant class automatically proper every time an action is brought as a defendant class action, since the plaintiffs in such cases always will allege that they have been aggrieved by the defendant class members' conduct.

In certifying a (b)(2) class and thereby denying the class members the right to opt out, the District Court reasoned that absent a (b)(2) defendant class "there could be no assurance that a mandatory remedial level of hours and wages could ever result, or that strict adherence to the rules of the hiring hall would be broadly maintained by employers, or that employers as a whole could be obliged to take steps to assure an awareness of the levels of minority employment in 542's jurisdiction." (PA. 205). But this reasoning puts the cart before the horse. The clear requirements of Rule 23 cannot be ignored or twisted beyond recognition in order to serve an imagined social goal of facilitating the imposition of hiring quotas on contractors which were never named as defendants or served with process and whose minority utilization statistics were never considered.

Accordingly, United respectfully submits that the District Court erred in certifying a defendant class under subdivision (b)(2), and requests this Court to order dismissal of the defendant class members from the case, as the Court of Appeals for the Fourth Circuit did in Paxman, *supra*.

CONCLUSION

For the foregoing reasons, United Engineers and Constructors Inc. respectfully requests this Court to reverse the judgment of the Court of Appeals and to direct that the Court of Appeals remand the case to the District Court with instructions to dismiss with prejudice the case against United.

Respectfully submitted,

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ADDENDUM

Statutory Provisions and Rules Involved

Section 1 of the Civil Rights Act of 1866, codified at 42 U. S. C. § 1981, provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 23(a) of the Federal Rules of Civil Procedure provide as follows:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) of the Federal Rules of Civil Procedure provides as follows:

> (b) *Class Action Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(c)(2) of the Federal Rules of Civil Procedure provides as follows:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.